IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 9TH JULY 2007 / 18TH ASHADHA 1929

WP(C).No. 605 of 2005(V)

AGAINST THE ORDER IN OS 326/2000. IN
OS.565/1999 of MUNSIFF COURT, THALIPARAMBA

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PETITIONER:

THOYADANTAKATH PANAKKUNNUMMAL HAMZA,
S/O. AMINA, AGED 62 YEARS, AGRICULTURIST,
RESIDING AT TALIPARAMBA AMSOM DESOM,
TALIPARAMBA TALUK, KANNUR DISTRICT

BY ADV. SRI.B.PREMNATH (E)

RESPONDENTS:

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1. NALARAKKETTIL UNDA MOIDEENKUTTY,
S/O MUHAMMED, AGED 45 YEARS,
RESIDING AT PANNIYOOR AMSOM DESOM,
KURUMATHUR PANCHAYAT, WARD NO.2, HOUSE NO.243,
TALIPARAMBA TALUK, KANNUR DISTRICT.

2. NALARAKKETILL UNDA MARIYUMMA (DIED)

3. CHILDREN: NALARAKKETTIL UNDA AMINA,
AGED 47 YEARS, KUTTIYERI AMSOM, VAYAD DESOM,
PARIYARAM PANCHAYATH, TALIPARAMBA TALUK,
KANNUR DISTRICT.

4. NALARAKKETTIL UNDA PATHUMMA,
AGED 43 YEARS, PANNIYOOR AMSOM DESOM,
KURUMATHUR PANCHAYATH, TALIPARAMBA TALUK,
KANNUR DISTRICT.

5. NALARAKKETTIL UNDA ASSAN,
AGED 41 YEARS, PANNIYOOR AMSOM DESOM,
KURUMATHUR PANCHAYATH, TALIPARAMBA TALUK,
KANNUR DISTRICT.

6. NALARAKETTIL UNDA RUKHIYA
AGED 39 YEARS, PANNIYOOR AMSOM DESOM,
KURUMATHUR PANCHAYATH, TALIPARAMBA TALUK,
KANNUR DISTRICT.

7. NALARAKKETTIL UNDA KHADEEJA
AGED 37 YEARS, KUTTIYERI AMSOM, VAYAD DESOM,
PARIYARAM PANCHAYATH, TALIPARAMBA TALUK,
KANNUR DISTRICT.

8. NALARAKKETTIL UNDA ASYA AGED 35 YEARS,
PANNIYOOR AMSOM DESOM, KURUMATHUR PANCHAYATH
TALIPARAMBA TALUK, KANNUR DISTRICT.

9. NALARAKKETTIL UNDA NEBISSA
AGED 33 YEARS, PANNIYOOR AMSOM DESOM,
KURUMATHUR PANCHAYATH, TALIPARAMBA TALUK,
KANNUR DISTRICT.

BY ADV. SRI.O.V.MANIPRASAD

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 09/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC : 605 OF 2005

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 : TRUE COPY OF THE PRELIMINARY DECREE DT.31.01.2000 IN OS NO.565 OF 1999 BEFORE THE MUNSIFF'S COURT, TALIPARAMBA.

EXT.P2 : TRUE COPY OF THE PLAINT SCHEDULE IN OS NO.326 OF 2000.

EXT.P3 : TRUE COPY OF THE ORDER OF THE MUNSIFF'S COURT, TALIPARAMBA IN IA No.1067 OF 2004 IN OS NO.565 OF 1999.

RESPONDENTS' EXHIBITS:

EXT.R1 (A) : TRUE COPY OF THE PLAINT IN OS NO.565 OF 1999

EXT.R1(B) : TRUE COPY OF THE PLAINT IN OS NO.326 OF 2000

EXT.R1(C) : TRUE COPY OF THE AFFIDAVIT FILED BY THE PETITONER IN IA NO.1064 OF 2004 IN OS NO.565 OF 1999.

PIUS C. KURIAKOSE, J.

W.P.(C) No. 605 OF 2005

Dated this the 9th day of July, 2007

JUDGMENT

Impugned in this Writ Petition is Ext.P3 by which the learned Munsiff dismissed an application for re-opening a preliminary decree passed in OS No.565 of 1999 filed by the 1st respondent arraying the other respondents in the writ petition as defendants. The case of the petitioner is that since the petitioner and certain other sharers are not parties to OS No.565 of 1999, petitioner filed a fresh suit as OS No.326 of 2000 to partition the same plaint schedule property and an application seeking a joint trial of these two suits arraying all necessary parties is pending before the learned Munsiff. The application for re-opening the preliminary decree already passed in OS No.565 of 1999 became necessitated lest there should be conflicting preliminary decrees. The Registry has reported that the application for joint trial of OS Nos.326 of 2000 and 525 of 1999 and a third OS, OS No.211 of 2000 about which neither of the counsel has any idea is pending before the Trial Court. Whatever that be, the grievance which is seriously high lighted before me by the learned counsel for the petitioner is that the learned judge without noticing the ratio of Supreme Court judgment in **Phoolchand v.**

Gopal Lal [AIR 1967 SC 1470] and that of this Court in **Kochu Kunju Stephen v. Ashia Ummal** [2005 (1) KLT 944], dismissed the application as if there is no power at all for the court to allow the preliminary decree. A reading of the impugned order will also indicate that the court seems to be of the view that there is not scope for re-opening a preliminary decree which has been passed after trial. That view cannot be correct. The question whether preliminary decree should be re-opened or whether a supplementary/preliminary decree should be passed are all questions to be decided by the court below on the facts and circumstances obtaining in the case and the materials placed on record by the parties.

I set aside the impugned order and direct the learned Munsiff to take a fresh decision on the application filed by the petitioner giving due regard to the principles laid down in **Phoolchand**'s case(supra) and **Kochu Kunju Stephen**'s case(supra) and any other judicial precedent which may be cited by the counsel on either sides. Fresh decision as directed above will be taken by the learned Munsiff within two months of receiving a copy of this judgment. Considering the above directions I further direct that the order of stay presently passed by this Court in respect of the final decree proceedings in OS No.565 of 1999 will

continue for a further period of three months, of the petitioner producing a copy of this judgment before the court below.

PIUS C. KURIAKOSE, JUDGE

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